

No. 75-1623

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

SIDNEY F. BROWN, JR., PETITIONER

v.

DAVID C. LUNDGREN, WARDEN,
FEDERAL CORRECTIONAL INSTITUTION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22-27) is reported at 528 F. 2d 1050. The order of the district court (Pet. App. 21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1976. The petition for a writ of certiorari was filed on May 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the decision of the Board of Parole denying petitioner's application for parole violated either the Due Process Clause of the Fifth Amendment or the Board's published guidelines for parole release.

(1)

STATEMENT

Petitioner is a federal prisoner currently serving a sentence of five years' imprisonment in the Federal Correctional Institution, Seagoville, Texas. That sentence was imposed following petitioner's plea of guilty on May 4, 1973, to a two-count indictment charging him with two separate acts of having unlawfully distributed amphetamine sulphate, a Schedule II controlled substance, in violation of 21 U.S.C. 841(a)(1). In February 1975 the South Central Office of the Board of Parole (now the Parole Commission)¹ denied petitioner parole on the basis of its guidelines for the release of adult offenders set forth in 28 C.F.R. 2.20 (Pet. App. 15). The Regional Director of the Board of Parole affirmed this decision (Pet. App. 16), and the National Appellate Board also affirmed (Pet. App. 17). Petitioner then filed a petition for a writ of *habeas corpus* in the United States District Court for the Northern District of Texas, alleging that the Board of Parole had failed to follow its published guidelines in considering his application for parole. The district court denied relief, and the court of appeals affirmed.

The release guidelines of the Board of Parole establish ranges of confinement within which the Board ordinarily will consider an offender eligible for parole. The range of confinement is determined in particular cases by a combination of (a) the offense severity level and (b) parole prognosis characteristics. 28 C.F.R. 2.20(b). The regulation provides examples of "offense behaviors for each severity level," but notes that "especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that

¹See the Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219 *et seq.*

listed" and that "[i]f an offense behavior involved multiple separate offenses, the severity level may be increased" (28 C.F.R. 2.20(d) and n. 4). The "offender characteristics," which are compiled to compute a "salient factor score," include such factors as prior convictions and incarceration, prior drug involvement, family situation, and the like.

Petitioner was notified by the Parole Board that his "offense behavior" had been classified as "very high severity" and that he had been given a salient factor score of seven (Pet. App. 15). The crime of unlawfully distributing amphetamine sulphate, if considered without regard to the context in which it occurred, would have resulted merely in a "high" severity rating and (coupled with petitioner's salient factor score of 7) would have yielded a projected incarceration of 20 to 26 months. The Board told petitioner that it had used the "very high severity" level because his "offense behavior consisted of multiple separate offenses" and his "[p]rior record shows [a] history of assaultive or violent conduct * * * demonstrating a potential for assaultive behavior" (Pet. App. 18).² The Board previously had informed petitioner that it regarded as significant: (a) that he had distributed the amphetamine in the instant case while free on bail following his arrest in February 1972 for another sale of amphetamine; (b) that he had admitted to an undercover agent that he had unlawfully distributed drugs for some eleven years; and (c) that he was reputed to be a major source of illegal distribution of amphetamines in the

²In July 1965 petitioner had been charged in state court with felonious assault upon his daughter, a minor (see Appendix in the court of appeals, p. 33).

southern United States.³ According to the Board's guidelines, therefore, petitioner was ordinarily expected to serve a term of 36 to 45 months before his release, whereas he had served only 19 months (Pet. App. 15, 18). The Board further "found that a decision outside the guidelines at this consideration does not appear warranted" (Pet. App. 15).

ARGUMENT

Petitioner does not question the authority of the Board of Parole to consider both the nature of his offenses and aggravating circumstances such as his prior record. He contends, however, that the Board, after properly considering these factors in computing his salient factor score, arbitrarily used them a second time to classify his "offense behavior" level as "very high" instead of "high." The Board's procedure in twice considering these factors, petitioner asserts, violated fundamental concepts of fairness and therefore denied him due process of law (Pet. 2, 10). He further contends that the Board's own published guidelines were violated (Pet. 4, 12-13).

1. Petitioner's claim that the Board's procedure in this case violated the Due Process Clause of the Fifth Amendment presupposes that in being denied release on parole at the present time he has been deprived of either "liberty" or "property" within the meaning of the Due Process Clause. See generally *Meachum v. Fano*, No. 75-252, decided June 25, 1976. The issue whether a prisoner's

³The Board's awareness of these facts, as the court of appeals noted (Pet. App. 27), had been made known to petitioner at the initial hearing on his application for parole. See also the affidavit of Gerald Rudolph, Administrative Hearing Examiner of the South Central Office, United States Board of Parole, which was filed with the government's response to petitioner's *habeas corpus* petition (Appendix in the court of appeals, pp. 36-40).

application for release on parole implicates the procedural protections of the Due Process Clause is presently before this Court in *Scott v. Kentucky Parole Board*, No. 74-6438, certiorari granted, December 15, 1975.

Our brief as *amicus curiae* in *Scott* argues that when, under the governing law, the decision to grant or deny parole is completely discretionary—i.e., when no determinable set of facts entitles a prisoner to be released—he has no constitutionally protected liberty or property interest in being released.⁴ We observe in our brief (p. 25, n. 14) that, although the federal parole authority's guidelines articulate some objective criteria that influence its release decisions by indicating a "normal" range of release times, the guidelines are expressly subject to the rule that "[t]he granting of parole rests in the discretion of the Board of Parole" (28 C.F.R. 2.18) and that "[w]here the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered" (28 C.F.R. 2.20(c)). Because no set of facts entitles petitioner to be released, the Due Process Clause does not require the use of any particular procedures in making the release decision.

Although one issue presented by petitioner could thus be affected by the decision in *Scott*, we submit that there is no need to hold this case pending disposition of that case. Even assuming that the parole release decision implicates the Due Process Clause, there can be no serious claim in this case that the Board's action in classifying the severity level of petitioner's offense as "very high" was fundamentally unfair. Petitioner's argument rests

⁴A copy of our brief in *Scott* is being furnished to counsel for petitioner.

upon the assertion that in so classifying his offense the Board considered factors that it had already used in computing his "salient factor score." That assertion is only partly correct. In selecting the severity level of the offense the Board considered the fact that petitioner's conviction rested upon the commission of "multiple separate offenses." But while 28 C.F.R. 2.20 (Pet. App. 28, n. 4) specifically provides that this factor may be a basis for increasing the severity level of the offense, the salient factor score worksheet (Pet. App. 29, 30) makes no reference to this factor. Thus, the Board applied an independent criterion specifically authorized by the guidelines in assessing the severity of his offense.

What is more, there is no support for petitioner's apparent argument that the Due Process Clause forbids considering the same facts as part of both the offense severity and the offender characteristics. The Board did not transgress any constitutional command by deciding that it could best make decisions by looking at each fact and separately assessing what effect that fact had upon its evaluation of both offense and offender. Indeed, that is the way most people proceed in the conduct of their daily affairs; the consequences of facts are not assigned to watertight compartments. In considering one fact—petitioner's prior convictions—both in calculating his "parole prognosis" and in assessing the gravity of his current offense, the Board acted within its discretion to consider the complete circumstances of a prisoner's "offense behavior" and consistently with its obligation to ensure that petitioner's release was "not incompatible with the welfare of society" (28 C.F.R. 2.18). As the court of appeals concluded (Pet. App. 27):

The board's own guidelines allow it to take into consideration aggravating circumstances in setting the degree of offense severity. Such an adjustment

based on the individual circumstances of [petitioner's] case clearly falls within the board's discretion. This is equally true of the use of those factors for more than one purpose. We hold that the parole board may, within its discretion, consider such matters in adjusting the degree of offense severity in particular cases. See also *Lupo v. Norton*, D. Conn., 1974, 371 F. Supp. 156.

2. The argument we have set out above answers petitioner's contention that the Board violated its own regulations. We also observe that violation by the Board of its release regulations is not a ground for relief. The regulations were established for the convenience of the Board and serve to ensure internal operating uniformity. They create no entitlement to release from prison. The Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219, 231, to be codified at 18 U.S.C. 4218(d), provides that actions of the Parole Commission in releasing or declining to release an individual prisoner are "committed to agency discretion" and hence not reviewable under the Administrative Procedure Act, 5 U.S.C. 701.

3. Petitioner contends (Pet. 4) that at his original parole hearing he was not informed of the reasons why the Board ultimately classified his offense behavior as "very high". The court of appeals correctly noted, however, that petitioner was in fact informed of those reasons "and was allowed to contest them at that time. The context of his federal arrest and the information in the presentence report [referring, for example, to petitioner's admission of a history of drug-dealing] were considered at the same hearing and were also subject to challenges by him" (Pet. App. 27). Moreover, petitioner was free to contest the Board's decision, even following its affirmance at the national level, by bringing to the attention of the

Regional Director any "new information of substantial significance" possibly affecting the Board's decision (28 C.F.R. 2.28).⁵

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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⁵Petitioner also seeks review of the issue whether *habeas corpus* "is the appropriate vehicle to test the legality of continued incarceration based upon decisions by the United States Board of Parole" (Pet. 13). But the court of appeals did not decide this issue adversely to petitioner, and its decision did not turn upon the form of the action petitioner had brought. And the court (properly, in our view) allowed petitioner to litigate his grievances with the parole authorities in a suit naming only his immediate custodian as respondent. There is, accordingly, no reason for this Court to consider this issue.